

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE COMPLAINT) FILED BY WWC LICENSE LLC AGAINST) GOLDEN WEST TELECOMMUNICATIONS) COOPERATIVE, INC., VIVIAN) TELEPHONE COMPANY, SIOUX VALLEY) TELEPHONE COMPANY, UNION) TELEPHONE COMPANY, ARMOUR) INDEPENDENT TELEPHONE COMPANY,) BRIDGEWATER-CANISTOTA INDEPEND-) ENT TELEPHONE COMPANY AND) KADOKA TELEPHONE COMPANY) REGARDING INTERCARRIER BILLINGS)	ORDER GRANTING MOTION IN LIMINE AND JOINT MOTION FOR CONTINUANCE OF HEARING; ORDER DENYING MOTION FOR PARTIAL SUMMARY JUDGMENT CT05-001
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On February 16, 2005, the Public Utilities Commission (Commission) received a complaint filed by WWC License LLC (Complainant) against Golden West Telecommunications Cooperative, Inc., Vivian Telephone Company, Sioux Valley Telephone Company, Union Telephone Company, Armour Independent Telephone Company, Bridgewater-Canistota Independent Telephone Company and Kadoka Telephone Company (Golden West Companies) regarding intercarrier billings.

On September 7, 2005, the Commission received an Amended Complaint from WWC. On September 15, 2005, the Commission received an Amended Answer and Amended Counterclaim from Golden West Companies. On September 20, 2005, the Commission received a Petition to Intervene from South Dakota Telecommunications Association (SDTA). On September 23, 2005, the Commission received WWC's Answer to Golden West Companies' Amended Counterclaim. At its regularly scheduled meeting of October 4, 2005, the Commission granted intervention to SDTA.

On January 6, 2006, the Commission received a Joint Motion in Limine from Golden West Companies and SDTA, and a Motion for Partial Summary Judgment from WWC. On January 9, 2006, the Commission received WWC's Motion to Compel Production of Discovery Responses. On January 12, 2006, the Commission received WWC's Brief in Response to Joint Motion in Limine. On January 13, 2006, the Commission received a Brief of Golden West Companies in Opposition to WWC's Motion for Partial Summary Judgment. On January 27, 2006, the Commission received a Joint Motion for Continuance of Hearing from Golden West Companies and SDTA.

The Commission finds that it has jurisdiction in this matter pursuant to SDCL Chapters 1-26, 49-1, including 49-1-9 and 49-1-11, 49-13, including 49-13-1 through 49-13-14.1, inclusive, and SDCL Chapter 49-31, including 49-31-3, 49-31-7, 49-31-7.1, 49-31-7.2, 49-31-11, 49-31-76 and 49-31-89, and ARSD Chapters 20:10:01 and 20:10:32.

At its ad hoc meeting of January 27, 2006, the Commission considered the Motion to Compel, Motion in Limine, Joint Motion for Continuance of Hearing and Motion for Partial Summary Judgment. At the hearing, WWC stated that the Motion to Compel had been resolved. Tr. at p. 4. The Commission accordingly took no action on the Motion to Compel. The Commission unanimously voted to grant the Motion in Limine and Joint Motion for Continuance of Hearing and voted two to one to deny the Motion for Partial Summary Judgment, with Chairman Sahr dissenting (see attached dissent).

The Commission finds and concludes that the last sentence of Section 2.1 of the parties' Reciprocal Interconnection, Transport and Termination Agreement (Agreement) at issue in the Motion in Limine is straight-forward and unambiguous and that interMTA traffic is subject under the Agreement to intrastate and interstate access charges in accordance with the definitions in the Agreement, applicable access tariffs and laws, rules and decisions applicable thereto.

With respect to the Motion for Partial Summary Judgment, the Commission concludes that the decision of whether Section 7.2.3 of the Agreement is a binding covenant to negotiate in good faith that was breached or was an unenforceable agreement to agree should be based upon a complete evidentiary record. The parties pointed to no South Dakota statute or precedent directly addressing the enforceability of a covenant to negotiate in good faith. The Court in *Deadwood Lodge No. 508, etc. v. Albert*, 319 N.W.2d 823 (S.D. 1982) placed significance on the fact that the trial court had made a finding of fact that the parties had negotiated in good faith. This raises at least some question as to the legal significance of negotiating in good faith under such circumstances and the enforceability of a covenant to negotiate in good faith tied to a mutual agreement clause. When considered in the context of the fact that both *Deadwood Lodge* and *Estate of Fisher v. Fisher*, 645 N.W.2d 841 (S.D. 2002) were three-two decisions and that the Commission's powers under 47 U.S.C. § 252 and state law to determine interconnection and access charge rates and terms in the absence of agreement, the Commission concludes that the questions of law and fact with respect to the enforceability of Section 7.2.3 should be decided upon a complete hearing record.

It is therefore

ORDERED, that the Motion in Limine and Joint Motion for Continuance of Hearing are granted and the Motion for Partial Summary Judgment is denied.

Dated at Pierre, South Dakota, this 26th day of February, 2006.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, by facsimile or by first class mail, in properly addressed envelopes, with charges prepaid thereon.

By: Melaine Kaelo

Date: 3/2/06

(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION:

Robert K. Sahr

ROBERT K. SAHR, Chairman, voted to grant the Motion in Limine, but dissented on denying the Motion for Partial Summary Judgment

Dustin M. Johnson

DUSTIN M. JOHNSON, Commissioner

Gary Hanson

GARY HANSON, Commissioner

**DISSENT OF CHAIRMAN SAHR
ON MOTION FOR PARTIAL SUMMARY JUDGMENT**

I would grant WWC's Motion for Partial Summary Judgment on the grounds that the second paragraph of Section 7.2.3 of the parties' Reciprocal Interconnection, Transport and Termination Agreement at issue in this motion does not create an enforceable obligation under South Dakota contract law, but is rather an unenforceable "agreement to agree" under the established Supreme Court precedent. The paragraph at issue reads as follows:

The initial PIU factor to be applied to total minutes of use delivered by the CMRS Provider shall be 3.0%. This factor shall be adjusted three months after the executed date of this Agreement and every six months thereafter during the term of this Agreement, based on a mutually agreed to traffic study analysis. Each of the Parties to this Agreement is obligated to proceed in good faith toward the development of a method of traffic study that will provide a reasonable measurement of terminated InterMTA traffic.

In *Estate of Fisher v. Fisher*, 645 N.W.2d 841 (S.D. 2002) and *Deadwood Lodge No. 508, etc. v. Albert*, 319 N.W.2d 823 (S.D. 1982), the Court held that a contract covenant in which the only expressed agreement is an agreement to agree on something in the future is not sufficiently definite to render it enforceable. I believe the paragraph above is such a clause, that there is no ambiguity in its language, that the issue of its enforceability is a question of law and that WWC is entitled summary judgment as a matter of law pursuant to SDCL 1-26-18.



ROBERT K. SAHR, Chairman

